STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: R. T. ENGLUND COMPANY Employer, and United Farm Workers of America Petitioner.	CASE NO. 75-RC-35-M 2 ALRB No. 23

STATEMENT OF FACTS

A Petition for Certification was filed by the United Farm Workers of America, AFL-CIO ("UFW") on September 5, 1975, seeking to represent employees of this employer.[1/] An election was conducted on September 12, 1975, in which the UFW received 66 votes and "No Union" received 11 votes. Two ballots were voided and six persons voted under challenge. The employer filed objections which were heard on November 10, 1975 at

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[1/] Previously, on September 2, 1975, the Western Conference of Teamsters ("Teamsters") and certain affiliated locals had filed a Petition for Certification seeking an election among approximately 6,000 agricultural employees of some 156 different agricultural employers. The R. T. Englund Company was one of the employers named in that petition. The Teamster's petition was dismissed by the Regional Director and his dismissal was sustained by this Board. See Eugene Acosta, et. al., 1 ALRB No. 1 (1975).

Salinas, California.[2/]

1. Request for a Continued Hearing

At the hearing the employer moved for a continuance on the ground of unavailability of witnesses who had moved to work in the company's harvesting operations in Imperial Valley. The hearing officer decided to proceed with the hearing as scheduled indicating to the parties they could pursue their motion, if at the conclusion of the hearing, they still considered a continuance necessary. The employer in fact renewed his motion. The hearing officer referred the motion to the Board suggesting to the parties that they make an offer of proof in their post hearing briefs.[3/]

A. At the opening of the hearing the employer made its motion for a continued hearing solely for the purpose of obtaining the testimony of one of its employees, Ms. Luz Alvarez. The employer indicated she would testify as to Board agent misconduct and that she was at the time of the Salinas hearing working at the Imperial Valley operations of the employer. Since the witness was still in the employ of the employer we

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[2/]The employer charged that the Board improperly determined the makeup of the bargaining unit because it failed to hold a hearing regarding the appropriate unit. This charge is an improper subject for review under Labor Code §1156.3(c) and should not have been set for hearing thereunder. It apparently questions the validity of certain provisions of our Act and regulations, namely Labor Code §1156.3 (c) and 8 Cal. Admin. Code §§20300(b) and 20365 (c). See Samuel S. Vener Co., 1 ALRB No. 10 (1975).

[3/]The UFW made a similar motion on the same grounds prior to the hearing. The Board advised that that motion should be ruled on

(fn. cont'd on p. 3)

cannot say she was "unavailable" or that the employer could not have brought her to the hearing. But even assuming that she was unavailable, her proposed testimony would not change the result of this decision. As set forth below, we find that even if the allegations in Ms. Alvarez's declarations were true the alleged misconduct would not be sufficient to set aside this election. The motion for *a* further hearing to obtain the testimony of Ms. Alvarez is therefore denied.

B. At the close of the hearing and in his post hearing brief the employer requested a continued hearing to present testimony of persons who were in the Imperial Valley as to (1) the incident of an UFW organizer in a truck with a UFW bumper sticker on it within sight of the polling place, (2) testimony as to alleged incorrect instructions by Board agents on the ballots, and (3) availability of eligible workers still in the area who would have voted if given sufficient notice. These issues were all addressed at the hearing and we find that additional evidence would be merely cumulative. They are more fully

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(fn. 3 cont'd)

by the hearing officer. The UFW subsequently withdrew its motion. The Employer, relying on the notice to the UFW, did not make its motion until the date of the hearing. The Employer characterizes as "unfair" the fact that the hearing officer did not rule on his motion despite the fact that the Board had indicated she would do so in the case on the UFW motion. However, since the hearing officer reserved for the employer the right to address his motion to the Board the effect is that the hearing officer denied the employer's motion and the consideration of the motion de novo by the Board does not constitute "unfairness" or denial of due process.

discussed below. Further, we note that the employer had sufficient time to prepare his case, and even if he believed that the hearing officer would rule on his motion for a continuance, he cannot rely on his belief that the ruling would be in his favor as a basis for a continuance. Since his potential witnesses were in his employ, there was no reason, other than convenience, why he could not present them at the scheduled hearing. For these reasons the motion for a continued hearing to present additional testimony is hereby denied.

2. Effect of Pre-Existing Collective Bargaining Agreement

The employer has objected to the election on the ground that the Petition for Certification filed by the UFW was barred by pre-existing contracts which it had with the Teamsters and Local 890. Both contracts had been entered into prior to the effective date of the Agricultural Labor Relations Act ("Act"). (Labor Code §1140, et. seq.) Labor Code §1156.7 (a) provides that "no collective bargaining agreement executed prior to the effective date of this chapter shall bar a petition for election." The employer attacks the constitutionality of that provision. This allegation is not a proper ground for objections and, accordingly, is dismissed. Admiral Packing Company, 1 ALRB No. 20 (1975).

3. Failure of the Ballot to Include the Teamsters

The employer objects to the election on the ground that the ballot failed to include the union signatory of the existing collective bargaining agreement. The Teamsters filed a

Petition for Certification on September 2, 1975 on a multi-employer unit which included R. T. Englund as the employer. Their petition was dismissed by the Regional Director on September 9, 1975, finding that the unit sought was inappropriate. The employer through its agent, the Employer's Negotiating Committee, and the Teamsters, filed separate requests for review of the Regional Director's determination. A review was granted with a hearing conducted on September 16, 1975, before the full Board. The Board sustained the Regional Director's determination.[4/]

As of September 5, 1975, the Teamsters were aware that the UFW had filed a Petition for Certification and knew of their right to intervene. This became clearer as of September 9, 1975, when the Teamster's petition had been dismissed. At that point, the Teamsters had approximately two days in which to intervene. This task would not have been difficult, if, as the employer indicates in its post-hearing brief, the Teamsters had a sufficient showing of interest initially.[5/] Nevertheless, the Teamsters chose solely to pursue a review of the Regional Director's dismissal, the record being devoid of any evidence indicating that the Teamsters had attempted to intervene.[6/] Furthermore, we note that the Teamsters filed motions to intervene in certain other

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[4/] Eugene Acosta, et. al., 1 ALRB No. 1 (1975).

[5/] Labor Code §1156.3(b) requires only a 20 percent showing of interest for an intervenor.

[6/] This is clearly different from the facts in V. V. Zaninovich, 1 ALRB No; 24 (1975) where the potential intervenor only had at most 60 hours to intervene and, in fact, did attempt to intervene. Here the election was held on the 7th day after the petition was filed.

cases involving employers within the alleged multi-employer bargaining unit. They could have done so here without prejudice to their alternative position that only the multi-employer unit was appropriate. The employer's objection is based on the inaction of the Teamsters. This objection is therefore dismissed. See also Green Valley Produce Cooperative, 1 ALRB No. 8 (1975) at p. 4 of Slip Opinion.

4. Communication Between the UFW and the Board

The employer has also alleged that ex parte communication occurred between the UFW and the Board agent. In essence, it argues that such conduct was prejudicial in that the Board agent "apparently made his decision on the time and place of the election based upon those ex parte communications."[7/] The evidence introduced related solely to what transpired during the pre-election conference which was held at the Board's Regional Office in Salinas on September 11, 1975. During this time, the UFW was picketing the Board; the UFW refused to meet in Board offices. Alternatively, the union requested that the conference to be held in a coffee shop across the street. The employer refused. Nonetheless, the meeting proceeded in the Board's Regional Office with the Board agent asking certain questions of the employer and its counsel, leaving the room to telephone the UFW, returning to report what the UFW said, and then asking further questions of the employer and its counsel.

[7/] The employer's argument of prejudice herein relates to another allegation to be discussed infra, concerning insufficient notice of the election.

The rules against ex parte communications, 8 Cal. Admin. Code §§20700.1 et.seq., are applicable to specified types of on-the-record proceedings. Section 20700.3. In the course of investigating facts relating to an election petition, and of making arrangements for an election if it is determined that an election should be conducted, board agents must of necessity have some communications with the parties independently.[8/] An allegation that a board agent "met unilaterally" with representatives of the parties or their supporters does not in itself allege improper conduct. Coachella Growers, Inc., 2 ALRB No. 17 (1976). This objection is therefore dismissed.

5. Notice of the Election

Another objection raised by the employer is that both the pre-election conference and the election were not conducted properly in that there was insufficient notice of the election. The employer points out that of 134 eligible voters only 83 valid votes were cast. The facts are as follows.

On September 11, 1975, at approximately 1:30 PM, the board agent telephoned the employer, advising him that plans were being made to hold an election the following day and asking for preference as to time and place at which to hold the election.

[8/]The Board's rules on ex parte communications were patterned after the rules of the National Labor Relations Board on the same subject. Section 20700.3 (a), which makes reference to "investigative pre-election proceeding pursuant to Labor Code Sections 1156.3 or 1156.7" is based on Section 102.128 of the NLRB's Rules and Regulations, which make reference to "pre-election proceeding pursuant to Section 9(c) (1) or 9 (e)." In both sets of rules the prohibition applies only to "on-the-record proceedings", however. Since the- ALRA does not provide for an on-the-record proceeding prior to an election, inclusion of this portion of the NLRB's rules was an oversight. Coachella Growers, Inc., 2 AJLRB No. 17 (1976).

At 3:00 PM the employer received a Direction and Notice of Election from the agent indicating only the date on which the election was to be held. The pre-election conference was held that evening.

The employer testified that at the conference he objected to conducting the election at the workers' camp at 5:00 AM the following morning; instead, he preferred that it be held at the end of the workday, approximately 3:00 PM. Because the workers left the area for the weekend after work the Board agent rejected the proposal that the election be held at that time. The election was ultimately set for 9:00 AM the following day to be held at the sites where the crews were working.[9/]

The employer further testified that at the end of the conference he was not certain as to where the workers would be scheduled to work nor did he have any means of communicating with the workers prior to the election for purposes of notice. Additionally, it was his opinion that it would be very difficult for someone to know where the election was to be unless he were working for the employer on election day.

A union witness testified that he disseminated notices of the election which he had obtained on the evening of the preelection conference from the Board agent. He did this at the labor camp on the employer's property where 26 to 28 harvest crew employees lived. Further, he gave additional copies to some of

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[9/]The election actually commenced at 10:00 AM for the harvesting crew and 11:15 AM for the thinning and hoeing crew. No party objected to the opening of the polls one hour after the scheduled opening.

these workers asking them to pass on the notices to other workers. Other union witnesses testified that notice of the election had been communicated to all the workers on the two buses enroute to the fields the morning of the election.

The very short time constraints of the ALRA which requires an election to be held within seven days of the filing of a petition and which permits a party to intervene anytime up to within 24 hours prior to the election (Labor Code §1156.3), the various other matters such as peak employment and showing of interest that the Board agents have to determine and the competing views of the parties that the Board agents attempt to reconcile, all make the giving of exact nature of time and place of election difficult. Within the discretionary powers given to them, Board agents attempt to give as adequate a notice as possible. We believe they did so in this case.[10/] On the other hand, once a petition is filed, the employer and the unions can and usually do, inform the workers that an election will be held shortly. There is evidence that the union did so in this case and that the employer could have also done so.

Further, we note that according to the employer's testimony at least 90 eligible voters actually showed up for work on election day.[11/] These 90 workers therefore are presumed to have had

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[10/]We note that this petition was filed during the first week the ALRA was in effect.

[11/]In the reporters transcript, Mr. Englund is recorded as stating the number of eligible voters who showed up for work on election day as 98. The employer's attorney submitted a letter "correcting" the transcript to reflect only 90 voters actually showed up. However, he attached to his letter a declaration of Mr. R. T. Englund in which Mr. Englund states "there were 98 eligible voters actually working on election day."

adequate notice, leaving only 44 of the eligible 134 workers that might not have received notice. Assuming this is true, even if all of these workers and all the challenged workers voted for no union, their votes would not be sufficient to affect the outcome of this election. For these reasons then, this objection is dismissed.

6. Eligibility of Voters

The employer's objections' petition also alleges:

"Ineligible voters were allowed to vote. The agent failed to require proper identification.[12/]

The employer prepared an eligibility list which included the signature exemplars of the eligible voters and presented it to the Board. The Board agent refused the use of such a list and instructed the observers to accept any means of identification offered by the worker that showed his name. Driver's licenses

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[12/]Uncontroverted testimony demonstrates that one ballot which had been challenged was appropriately designated as such. However, it was placed in the ballot box without first having been inserted in a "challenged" envelope. While an error was made in allowing this ballot to be entered, the effect of such an error is de minimis given the margin of victory and therefore, could not affect the outcome of the election.

Other evidence offered by one of the employer's witnesses, who was an observer in the election was that one worker attempted to vote in the thinning and hoeing crew election, offering as identification a checkstub which had already been used in the harvesting election. It is the employer's position that the person who attempted to vote the second time was, in fact, a different person. However, this vote was not challenged by either of the observers, thereby making it difficult to investigate the validity of this vote and, therefore, the allegation made herein. It is the duty of the observer and Board agents to challenge those potential voters whose eligibility they have reason to question. It does not appear that the observers did so in this case. The testimony further indicates that this was the only questionable vote which had occurred in this manner and therefore we cannot conclude that there were such irregularities as to affect the outcome of the election.

and union cards[13/] were offered as identification for approximately one-half of the voters. Approximately 50 voters used payroll check stubs, 40 of which were from the most recent payroll period (that period from which the eligibility list was obtained). The remainder, approximately 10 voters, presented older check stubs. The two observers for the employer, testified that they were not familiar with most workers.

The standards set by 8 Cal. Admin. Code §20350 require that voters present "evidence of identification which the Board agent in his discretion deems adequate." The requirement goes no further. The question of inadequacy of identification was raised in Toste Farms, Inc., 1 ALRB No. 16 (1975) where, as here, payroll check stubs and UFW cards were offered as identification. The record reflects that the Board agent and the employer's observers checked for voter identification. Based on foregoing, while it may not under certain circumstances be inappropriate to request hand writing examples from the potential voters, we find no abuse of discretion by the Board agent in charge of supervising this election.

7. Conduct Affecting Election Results

Several allegations of improper conduct have been raised by the Employer: (a) UFW representatives at or near the polls during the election, (b) camper truck with a UFW rear bumper sticker in the polling area, and (c) misrepresentation by Board agent to

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[13/]The record does not reflect the nature of the union cards offered for identification.

voters regarding available choices on the ballot.

(a) Evidence presented regarding the presence of UFW representatives in the polling area was that a blue Volks-wagon automobile pulled up and parked about 25 yards from the polling booths after the election had commenced and remained there for about 15 or 20 minutes. Two UFW organizers were in the car watching the election process. The inference that the employer asks us to indulge in is that their mere presence without more, affected the outcome of the election. We find that even if they were observed by potential voters, their mere presence without any allegation that they were electioneering, talking to workers, or displaying union insignias is insufficient to set aside this election. Herota Brothers, 1 ALRB No. 3 (1975).

(b) Mr. Englund testified that he observed a camper truck with a UFW rear bumper sticker in the immediate vicinity of the harvesting crew election area during the voting. A bumper sticker on a truck in the roadway adjacent to the polling place, even if visible to the voters, under the circumstances of this election is not conduct sufficient to overturn an election, Herota Bros., id. Accordingly, this objection is dismissed.

(c) As to the issue of misrepresentation by the Board agent concerning available ballot choices, no evidence was offered by the employer at the hearing because its witness had moved to the Imperial Valley. The declaration which accompanied this allegation

indicated that the Board agent told certain voters that there were three spaces on the ballot, "one on the left for your union, one in the middle for no union, and one on the right for the Farm Workers Union." Assuming this is true, such instruction was incorrect as in fact there was no intervening union and consequently there were only two choices on the ballot. The reference to "your union" apparently was to the Teamsters since they had an existing contract with this employer. Since the ballot was printed in both Spanish and English and contained both the UFW and no union symbol, and since there was only one void ballot out of 85 cast, and since no evidence was presented that any voter was indeed misled or confused by this alleged instruction, we find it is not misconduct sufficient to set aside this election.

8. Post Election Ballot Counting Improprieties

Lastly, the employer alleges that the post election ballot counting procedures were improper as the employer was not given sufficient notice to have his observers present at the opening of the ballot box and counting the ballots.

The ballots in this and 16 other elections in the Salinas Valley had been impounded pending determination by the Board of the multi employer bargaining issue. Eugene Acosta, et. al., 1 ALRB No. 1 (1975). On the 17th of September the Board ordered the impounded ballots counted.

The employer received notice that the ballots were going to be counted that evening about 7:00 PM. Both he and his

counsel attended the ballot counting session. Both were present in the room when the ballots on R. T. Englund were counted about midnight. The employer objected to the proceedure on the grounds that his observers were not present and that the Board agent who conducted the election was not present.

It is obviously desirable that all parties receive adequate notice of the tally of ballots in all cases, and given an opportunity to have an observer present. Where there is any semblance of impropriety in the ballot count, or any substantial possibility for the occurrence of impropriety, failure to give such notice may well require setting the election aside. Here, however, there is no suggestion that the ballot box was tampered with or that the ballots were improperly counted. J. R. Norton Co., 1 ALRB No. 11 (1975); Carl Joseph Maggio, Inc., 2 ALRB No. 9 (1976). This objection is dismissed.

9. Teamster Objections to Including Truck Drivers

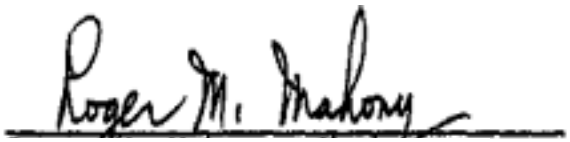
The Teamsters and Teamsters Locals 890, et. al. also filed petitions under §1156.3(c) in this matter. These petitions were dismissed, in part, as noted in the Partial Dismissal of Petition and Notice of Hearing issued by the Board on September 26, 1975, and Order of Dismissal of Petition issued by the Board on October 14, 1975. Remaining allegations were either withdrawn by the Teamsters or noticed for consolidated hearing to be held on October 7, 1975. At the hearing the Western Conference of Teamsters and Local 890 submitted memorandum and argued the issue of whether truck drivers were wrongfully included in the bargaining

unit.[14/] This Board then issued its decision in one of the consolidated cases, Interharvest Inc., 1 ALRB No. 2 (1975). It subsequently issued opinions in some of the other consolidated cases using the same reasoning and arriving at the same conclusion as in Interharvest (J. R. Norton Co., 1 ALRB No. 11 (1975); West Coast Farms, 1 ALRB No. 15 (1975); Salinas Marketing, 1 ALRB No. 26 (1975); and others.) The evidence before us indicates that the issues and the facts are similar herein and therefore we adopt the position we announced in those cases. On the objection that the truck drivers are within the coverage of the National Labor Relations Act and therefore not agricultural employees within the meaning of the ALRA, we find that since the number of employees in that classification is insufficient to affect the outcome of this election, we certify the UFW as the bargaining representative for a unit as described in the direction of election. As in Interharvest, we leave the status of employees in disputed classifications to be determined by the NLRB in proceeding currently before that agency, or if prompt clarification is not forthcoming from the NLRB then through proceedings for clarification or modification of the certification before this Board. On the objection that truck drivers should be excluded because of a separate history of collective bargaining and separate community of interest we hold that this Board had no jurisdiction to exclude agricultural employees on the basis of those arguments in view of the mandate contained in Labor Code §1145.2.

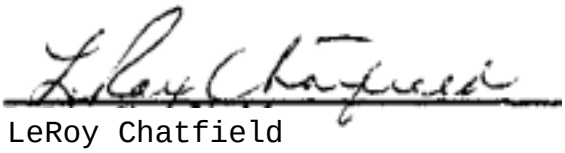
[14/]Records of the Regional Office indicate that there were 12 eligible truck drivers, 2 of them voted. There were 31 eligible hoers and stitchers, 19 of them voted.

Certification is ordered issued for all agricultural employees of the R. T. Englund Company.

Dated: January 30, 1976



Roger M. Mahony, Chairman



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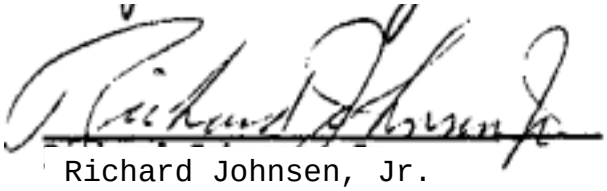

Richard Johnsen, Jr.

Joseph Grodin